No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.*,

Appellees.

Appellees' Petition for a Rehearing After Decision of the United States Circuit Court of Appeals for the Ninth Circuit.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable Justices of the United States Circuit Court of Appeals, for the Ninth Circuit:

The Petition of Frank D. Hall and Marguerite S. Hall, appellees, for a rehearing respectfully shows:

Status of the Appeal.

Under date of March 9, 1948, this Honorable Court filed its opinion herein, wherein it reversed the judgment of the District Court of the United States for the Southern District of California, Central Division, and remanded the cause with directions to the District Court to enter judgment in accordance with the views expressed in the said opinion.

Grounds for a Rehearing.

The appellees now urge that the decision of this Honorable Court is erroneous, and that this Court should give reconsideration to the questions relating to waiver of interest and to the compounding of interest after maturity, in order that there may be uniformity of decision upon those questions.

In this connection, it appears from the record, that the sole purpose of the proceeding in the District Court was to determine the amount of the debt of the appellees to the appellant; that the appellees successfully contended in the District Court that interest had been waived on the principal of the debt from the maturity of the debt; that the Conciliation Commissioner, however, acting on the principle that the appellees should do equity, since they sought equity, allowed simple interest at 7% per annum, on the principal of the debt for four years after its maturity; that the appellant, among other grounds of appeal, alleged error of the District Court in finding that there had been a waiver of interest and asserted that appellant should have been allowed compound interest from the maturity of the note until the actual payment of the note; that this Court reversed the District Court on the question of waiver and held that the appellant was entitled to compound interest to the date bankruptcy proceedings were initiated; that reference is made to the opinion of this Honorable Court for the full scope thereof.

POINTS ARGUED ON THIS PETITION FOR A REHEARING.

I.

Interest Was Waived.

The following is quoted from the opinion of this Honorable Court as it appears on page 5 thereof:

> "At any rate, waiver consists of a voluntary and intentional relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, there must be a clear unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right or acts amounting to an estoppel on his part (citing authorities). No such intent, or course of conduct on the part of appellant appears."

We have no criticism of the foregoing general statement of the law. It is appellees' position, however, that there were clear, unequivocal and decisive acts of State Banking Department in charge of the liquidation of Pan-American Bank of California which showed its intention to waive interest, and that the trier of the fact, the District Court (first by its Conciliation Commissioner, and second, on review by the District Judge) properly held that there had been a waiver and that, as to the years from 1932 to the Fall of 1939, in which latter year the appellant first became the owner of the note, the appellant was a complete stranger to the transaction; that when appellant acquired the obligation, it took it subject to any infirmities in the hand of the liquidator; that the

note had been overdue since July, 1932; that the maturity had never been extended and that the appellant was not a holder in due course; and that the appellant was bound by the waiver of the former holder. This subject is argued at length by counsel for appellees in appellees' brief—Argument of the Law—Point 1—pages 13 to 28, inclusive. The appellees also rely upon the circumstances that the Conciliation Commissioner found that the annual statements of account which were prepared by Citizens National Bank of Los Angeles, Trustee of the subdivision trust and collecting agent for the liquidator, in minute detail, and which purported to show the true balance of the unpaid obligation at the end of each year from 1933 to 1938 inclusive, were accepted by the liquidator as true statements of the obligation, and "that the said liquidator of Pan-American Bank of California would, at all times during which said liquidator was the owner and holder of said note, have accepted payment of the balance shown in the current account in full satisfaction of the said note, and which facts were known to the Pacific States Corporation at the time of the transfer of the note from said liquidator to said creditor." [Tr. p. 28.] The Conciliation Commissioner also found as follows:

> "For the years 1939 and 1940, the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account."

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> "For the years 1939 and 1940, the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account."

It was not until the year 1942, which was three years after appellant became the owner of the note—or nearly ten years after the first account, that any statement of account was rendered showing the addition of interest.

As further evidence that interest was waived by the liquidator, reference is made to the letter of March 19, 1936, addressed to F. D. Hall and demanding the payment of the balance due of $29,356.11 (which sum represented the unpaid principal without the addition of interest from April 1932). [See Debtors' Exhibit 2-7—Appendix to Appellees' Brief p. 10.] And as supporting the finding of the Conciliation Commission, reference is made to the testimony of F. D. Hall set forth in the appellees' opening brief, that the liquidator in 1939 offered to accept even less than the balance of the unpaid principal in settlement, and the testimony of Mr. McFarlane, that the balance of the indebtedness, as of a given date, was as shown in the bank's ledger (and which balance did not include any interest from 1932 to 1939).

We desire to emphasize appellees' contention that there are, in this case, clear, unequivocal and decisive acts of the creditor showing a purpose and intent to waive the interest. And in addition, there is no evidence that the failure to include interest over the eight-year period was due to any mistake on the part of the liquidator, or its agent. If these statements constitute Stated Accounts, as we respectfully assert they do, no proceeding to reform

the same has ever been instituted by appellant or its predecessor.

That the right to claim interest may be waived—see *Estate of Hein,* 32 Cal. App. (2d) 438, which also holds that once a right is waived, it is waived and gone forever.

In *Dee v. J. C. Forkner Fig Gardens, Inc.,* 105 Cal. App. 606, 610, the Court in holding that interest had been waived, said:

> "Nor was there any testimony or showing that the defendant had ever made a demand for interest or furnished any statement of the amount due."

And on the subject of the conclusiveness of waiver, see 56 Am. Jur., subject "Waiver," §24, p. 126, from which we quote:

> "A waiver is conclusive on the party waiving, or his privies. Where parties for whose benefit conditions are imposed waive them, strangers thereto cannot complain."

The appellant was a stranger to this obligation until the Fall of 1939, and cannot complain of what transpired in the previous years.

As to the sufficiency of the evidence, attention is called to 56 Am. Jur., subject "Waiver," §23, p. 126, where it is stated:

> "The sufficiency of the evidence relating to waiver is for the jury. The jury may be properly instructed

> as a matter of law, that a waiver must be voluntary and that it implies a knowledge of the right, claim or thing waived; yet whether it was voluntary and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury."

The Conciliation Commissioner found all the essential facts to constitute waiver, and his conclusion of law therefrom was proper, and should not be disturbed.

For additional authorities, we rely upon those listed under Point 1 in our opening brief, and in our letter to the Clerk of the Court supplementing the same.

For definitions and requirements of "Account Stated," we cite:

Coffee v. Williams, 103 Cal. 550;

Gardner v. Watson, 170 Cal. 570;

Merchants Nat. Bank v. Carmichael, 178 Cal. 446;

Beltaire v. Rosenberg & Son, 129 Cal. 164;

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and as to the setting aside of an Account Stated, to *Rebbock v. Reservoir Hill Gasoline Co.,* 14 Cal. App. (2d) 233, where it was held:

> "An Account Stated may be set aside only for fraud, mistake, or upon other grounds invalidating free consent of a contracting party."

II.

Even if Interest Had Not Been Waived, It Should Not Be Compounded.

This Honorable Court, on page 6 of its opinion, disagrees with appellees' contention that "until paid," as in the present case, should be read as "until maturity," and bases its decision in this connection upon *Bell v. San Francisco Savings Union,* 153 Cal. 64; and *Johansen v. Klipstein,* 104 Cal. App. 128.

We do not deny that where a promissory note expressly provides for the payment of interest at a certain rate "after maturity" or "before or after maturity," or that the interest shall be compounded "after maturity" or "before and after maturity" the contract is binding. The cases cited on this point do not, we respectfully submit, support the decision, but on the contrary, tend to support the contention of appellees. In the note in the first case, the note provided for interest of two-thirds of one per cent per month until payment of the principal and that in the case of default in the payment of principal or interest, such amounts should bear interest at the rate of one per cent per month until paid. The Court, in this case, construed the two-thirds of one per cent rate to apply only until maturity and the one per cent rate after maturity. Clearly, that decision is not against appellees' contentions. The other case, that of *Johansen v. Klipstein,* is not in point at all. There, the express agreement was to pay interest at 7 per cent per annum "from maturity until paid." In appellees' brief on this appeal, the topic under discussion is discussed at length under appellees' Point II, pages 29 to 32, and authorities and texts which support appellees' contentions are referred to and quoted from. We offer the same arguments upon

the point in question, without repeating them here, and cite as additional authority that compound interest is not favored by the Court,

33 C. J., subject "Interest," §33, p. 191;

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47 C. J. S., same subject, §63, p. 72.

In said section 29 of 47 C. J. S., subject "interest," it is stated to be the law, that the acceptance of simple interest on a debt will constitute a waiver of a claim for compound interest thereafter. Despite this law, and despite the fact that simple interest was accepted up to January, 1932 (after which time until the 1940 statement, no interest is credited), the appellant, in August, 1942, had the whole obligation recomputed on a compound interest basis from its commencement. [App. Ex. 2 AA, Tr. pp. 251-266.] This spurious statement, which appellees promptly repudiated, shows the unpaid obligation as of January 30, 1932, to be some $1,200.00 more than that shown as a result of the endorsements on the note, and appellant will, if the decision of this Court stands, insist upon re-opening the account from the beginning and of spiralling the obligation to an unbelievable and unwarranted height.

It is necessary that interest be added to principal to form a new principal, to enable it to be compounded. At no time during the five years before the maturity of the note, and at no time in the ten years following and until the attempt to recompute the obligation was made by appellant (a stranger to the obligation until 1939), was any interest added to form a new principal for the purpose of compounding the interest. Even had the current

holder been entitled to compound the interest after maturity, which we challenge, the right to do so was clearly and certainly waived.

Appellees respectfully submit that the decision of this Honorable Court is assailable in the respects mentioned, and they maintain that unless the decision is reconsidered and brought into conformity with previous decisions, a great and ruinous and unwarranted wrong will be done them. Appellees, therefore, humbly request that a rehearing be granted them in order that the present appeal may be reheard on the points mentioned, and the decision modified in the respects in which this Honorable Court, on reconsideration, finds it to be in error.

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